Supreme Court, U. S.
FILED
NOV 20 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. **78-843**

GEORGE JOSEPH SANTONI

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Harold I. Glaser
Richard M. Karceski
Saul Z. Reese

Attorneys for Petitioner

1504 Arlington Federal Bldg.
Charles & Lexington Streets
Baltimore, Maryland 21201
685-7666

INDEX

TABLE OF CONTENTS

Opinion Below 1

Jurisdiction 2

Question Presented 2

Statutory Provision Involved 2

Statement of the Case 4

Statement of Facts 4

Reason for Granting the Writ 9

Conclusion 24

Appendix A
Opinion of the United States Court of Appeals for the Fourth Circuit A. 1

Appendix B
Appendix to Petitioner's Brief to the United States Court of Appeals for the Fourth Circuit A.17

TABLE OF CITATIONS

Cases

Page

Glasser v. United States, 315 U.S. 60 (1942) 17

Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) . . . 21

Lester v. McFadden, 415 F.2d 1101 (4th Cir. 1969)(Haynsworth, C.J.) 18

McSparrow v. Weist, 402 F.2d 867 (3rd Cir. 1968) (en banc), cert. denied, 395 U.S. 903 (1969) 18

National League of Cities v. Usery, 423 U.S. 833 (1976) 20

Stirone v. United States, 361 U.S. 212 (1960) 9,11

United States v. ARcher, 486 F.2d 670 (2nd. Cir. 1977) 15

United States v. Augello, 451 F.2d 1167 (2nd Cir. 1971) 23

United States v. Culbert, 548 F.2d (9th Cir. 1977)(per curiam) . . . 22

United States v. Elders, No. 77-1181, slip op. at 12 (7th Cir. Feb. 1, 1978)(Bauer, J., dissenting) 22

United States v. Enmons, 410 U.S. 396 (1973) 21

United States v. Gambino, 566 F.2d 414 (2nd. Cir. 1977) 14

United States v. Hunter, 478 F.2d 1010 (7th Cir.) cert. denied, 414 U.S. 857 (1973) 11

United States v. Hyde, 448 F.2d 815 (5th Cir. 1971), cert. denied, 404 U.S. 1058 (1972) . . 13

United States v. Kuta, 518 F.2d 947 (7th Cir.) cert. denied, 423 U.S. 1014 (1975) 22

United States v. Merolla, 523 F.2d 51 (2nd Cir. 1975) 23

United States v. Russell, 411 U.S. 423 (1973) 19

United States v. Spagnola, 546 F.2d 1117 (4th Cir. 1969) (Haynsworth, C.J.) 10

United States v. Staszcuk, 502 F.2d 875 (7th Cir. 1974), aff'd. in part and rev'd in part on other grounds 517 F.2d 53 (7th Cir. 1974) 10,14,16,22

United States v. States, 488 F.2d 761 (8th Cir. 1973) 18

United States v. Yokley, 542 F.2d 200 (6th Cir. 1976) 21

STATUTES

Hobbs Act 18 U.S.C. §1951 (1970) . . 9,21

The Travel Act 18 U.S.C. §1952 (1970) . 15

28 U.S.C. §1359 (1970) . 18

MISCELLANEOUS

N. Abrams, Consultant's Report on Jurisdiction, 1 Working Papers of the National Commission on Reform of Federal Criminal Laws (1970) 20

Kilbert and Fort, National League of Cities v. Usery: Its Meaning and Impact; 45 Wash. L. Rev. 613, 632 (1977) 20

Stern, Prosecutions of Local Political Corruption Under the Hobbs Act: The Unnecessary Distinction Between Bribery and Extortion, 3 Seton Hall L. Rev. 1 (1971) . . 21

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO.

GEORGE JOSEPH SANTONI

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

Petitioner, George Joseph Santoni, prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit filed in the above entitled case on 19 October, 1978.

OPINION BELOW

The opinion of the United States Court

of Appeals for the Fourth Circuit is a published opinion which appears in Appendix A to this Petition, A.1 - A.16 , infra.

JURISDICTION

The Judgment of the United States Court of Appeals sought to be reviewed was filed on 19 October, 1978. The jurisdiction of this Court is invoked under 28 U.S.C.

QUESTION PRESENTED

1. Is a minimal interstate commerce connection, provided solely by the activities of the Government investigative agents themselves, absent some express showing of manifest necessity, insufficient as a matter of law to confer Federal criminal jurisdiction under the Hobbs Act?

STATUTORY PROVISION INVOLVED

This case and the issue presented involves the statutory provision of the Hobbs Act, 18 U.S.C. § 1951:

> "(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

> (b) As used in this section --
>
> (1) The term 'robbery' means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.
>
> (2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.
>
> (3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.
>
> (c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

June 25, 1948, c. 645, 62 Stat. 793."

STATEMENT OF THE CASE

On 7 December, 1976, the Grand Jury for the United States District Court for the District of Maryland handed up an indictment charging Petitioner, George Joseph Santoni, with having violated 18 U.S.C. § 1951 and 26 U.S.C. § 7206 (1).

The trial of Santoni commenced on 26 April, 1977, before The Honorable Edward S. Northrop, Chief Judge, with the aid of a Jury. On 5 May, 1977, the Jury returned verdicts of guilty on four Hobbs Act Counts; Appellant was found not guilty on the tax evasion count.

Subsequent to the entry of the verdict of the Jury, a Motion for New Trial was filed on behalf of Petitioner. This Motion was heard and denied.

Thereafter, George Joseph Santoni, Petitioner, was sentenced to the custody of the Attorney General or his authorized representative for imprisonment for a period of five years. It is from this conviction and sentence that Petitioner noted his Appeal to the United States Court of Appeals for the Fourth Circuit. His conviction having been affirmed, it is from that decision that Petitioner notes his timely request to this Honorable Court.

STATEMENT OF FACTS

In September, 1974, Salvatore Spinnato spoke to Special Agent Dudley Hodgson of the

Federal Bureau of Investigation about alleged political corruption and contract kickbacks in the City of Baltimore. Subsequently, Spinnato agreed to serve as a "consultant" to a company which would be formed by the FBI. The purpose of this company was not to engage in commerce or make a profit: it was to investigate wrongdoing in the Baltimore area.

As a result of his conversations with Spinnato, Agent Hodgson discussed the matter with the Baltimore office of the FBI; FBI Headquarters in Washington, D.C.; and the United States Attorney's Office in Baltimore. The formation of an undercover company was authorized and the funds therefore were provided by FBI Headquarters in Washington, D.C.

This undercover company, the "Municipal Chemical Corporation," was incorporated in Maryland in February, 1975. Agent Hodgson, using the false name "Douglas Hollier," became its president. Agent Hodgson invented a fake background to accompany his fake name, and lied, at times under oath, to city and state officials when he considered it necessary to the investigation.

Spinnato was associated with the Municipal Chemical Corporation from its inception: he had agreed to help the company bid for city contracts, conduct demonstrations, assist in whatever day-to-day work might be required, and attempt to get other people involved in order that the FBI "could see exactly what's going on in the City of Baltimore as far as contracts are concerned."

Spinnato and Petitioner had known one another prior to the formation of Municipal Chemical: they first met around 1970 when they planned and entered into a short-lived

and ill-fated business venture. Around the middle of June, 1975, Spinnato contacted Petitioner and told him that he (Spinnato) had associated himself with a company that had wealthy backers who were interested in securing city contracts. That company was, of course, the Municipal Chemical Corporation.

Over the course of the next few days, Spinnato and Petitioner had several conversations concerning the Municipal Chemical Corporation and city contracts. Spinnato testified that during this period Petitioner demanded $2,500 from Municipal Chemical or he (Petitioner) would "shut us down." Shortly thereafter, Spinnato testified, Petitioner demanded an additional $500. Spinnato testified that he received from an FBI agent two envelopes bearing the letterhead of Municipal Chemical Corporation; one envelope contained $2,500, the other contained $500. Spinnato further testified that he gave these envelopes to Petitioner.

Sometime prior to this transaction, FBI Special Agent Ronald Miller became associated with Municipal Chemical. His ostensible purpose for joining the company was to provide an additional $10,000 needed by the corporation; his real purpose for coming aboard was a feeling on the part of the FBI that an additional undercover agent was needed. Agent Miller adopted the false name "Ron Marco" and a false background to match. Agent Miller was listed, under his false name, as vice-president of Municipal, and Agent Miller admitted at trial that he had perpetrated a deceit upon the State of Maryland by filing an affidavit swearing that everything in Municipal's Articles of Incorporation was true.

The testimony of both FBI agents tended

to corroborate Spinnato's account of passing the $3,000 to Petitioner. Agent Miller testified that he took two envelopes, put $2,500 in one and $500 in the other, and gave both to Agent Hodgson. Agent Hodgson testified that he turned both envelopes over to Spinnato, and that he (Hodgson) saw Spinnato give both envelopes to Petitioner.

Subsequently, Municipal Chemical Corporation entered into a subcontract with a Mr. Nicolaidis, of Olympos Painting Company, whereby Municipal would perform certain work on a Baltimore City School in return for $16,000 to be paid by Olympos. There was some evidence apparently from which the jury concluded that it was extortionate activity on the part of Petitioner that caused Mr. Nicolaidis to enter into the subcontract with Municipal. At any rate, Spinnato testified that shortly after the subcontract was signed he gave Petitioner an envelope bearing the letterhead of Municipal Chemical Corporation containing $1,600, in payment of the ten percent kickback that Spinnato testified Petitioner had demanded. Here again, the testimony of both Agent Hodgson and Agent Miller tended to corroborate Spinnato's account of passing the $1,600 to Petitioner.

Over the next couple of weeks, Municipal Chemical carried out its part of the subcontract. In doing so, Municipal used a chemical sealer known as Hydron-300, as required by the contract. Municipal purchased some Hydron-300 in Maryland, and some in Pennsylvania. Agent Hodgson testified that Hydron-300 is manufactured in Pennsylvania, but there was no testimony that Hydron-300 is manufactured only in Pennsylvania, or, indeed, that domestically manufactured Hydron-300 was unavailable.

In performing its duties under the subcontract, Municipal Chemical made use of a "Sky-Climber" power scaffold which appears to have been manufactured by or rented from a California firm. Here again, however, there was no testimony that a domestically produced version of such an apparatus was unavailable.

Olympos Painting Company worked on the same school as did Municipal Chemical Corporation; their tasks, however, were different. Mr. Nicolaidis, the president of Olympos, testified, but nowhere in his testimony is the slightest reference to interstate commerce to be found. Although his testimony reveals that he made use of Hydron-300, he did so at Municipal's request, and, indeed, the Hydron-300 was provided by Municipal. Although Mr. Nicolaidis's testimony indicates that some of the Hydron-300 he used came from his own supply, there was no testimony that indicates that his Hydron-300 was manufactured or purchased out of state.

Spinnato testified that he met with Petitioner after the school job was completed, at which time Petitioner demanded $10,000 in exchange for which Municipal Chemical would be awarded city demolition contracts. Spinnato further testified that he and Agent Hodgson met with Petitioner the following day and the matter of a $10,000 payment in exchange for demolition contracts was again discussed. Agent Hodgson testified that Petitioner said that it would cost $10,000 to get into demolition, and that, after getting the go-ahead from FBI Headquarters in Washington, he (Hodgson) gave Petitioner $10,000 on October 31, 1975.

By February 3, 1976, the FBI had decided that Spinnato should leave the operation. By that time the FBI was paying Spinnato $300 a week for his services. On February 11, 1976,

the FBI decided to "close down the operation," and the Municipal Chemical Corporation, for all practical purposed, ceased to exist.

REASON FOR GRANTING THE WRIT

A minimal interstate commerce connection, provided solely by the activities of the Government investigative agents themselves, is, absent some express showing of manifest necessity, insufficient as a matter of law to confer Federal criminal jurisdiction under the Hobbs Act.

Petitioner, George Joseph Santoni, stands convicted of four counts of violating the Hobbs Act, 18 U.S.C. § 1951 (1970). Petitioner concedes at the outset that the Hobbs Act "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence. The Act outlaws such interference 'in any way or degree'". Stirone v. United States, 361 U.S. 212, 215 (1960). Thus, a defendant's impact upon interstate commerce need not be substantial in order to support a conviction.

As this court has said:

> As its language indicates, the [Hobbs Act] is not to be narrowly construed nor is it "limited to a conduct which directly and immediately obstructs a particular movement of goods in interstate commerce" but covers any extortions which in any degree may reasonable be regarded as affective commerce . . . . [A]ll that is required to bring an

> extortion within the statute is proof of a reasonable probable effect on commerce, however minimal, as a result of the extortion.

United States v. Spagnolo, 546 F.2d 1117, 1118-19 (4th Cir. 1976) (per curiam) (footnotes, citing cases, omitted).

Cited with approval in Spagnola, 546 F.2d at 119 n.6, was United States v. Staszcuk, 517 F.2d 53 (7th Cir. 1974) (en banc), cert. denied, 423 U.S. 837 (1975) where Judge (now Justice) Stevens, speaking for the Seventh Circuit Court of Appeals, said:

> We hold . . . that the commerce element of a Hobbs Act violation--the Federal Jurisdictional fact--may be satisfied even if the record demonstrates that the extortion had no actual effect on commerce . . . [J]urisdiction in the particular case is satisfied by showing a realistic probability that an extortionate transaction will have some effect on interstate commerce.

517 F.2d at 59-60. Staszcuk was, and arguably still is, the case that has gone furthest in reducing the degree of interstate commerce connection necessary to justify a Hobbs Act conviction. See id. at 66 (Pell, J., dissenting).

To be sure, Staszcuk stands for the proposition that the connection between the extortion and interstate commerce need only be de minimus; but Staszcuk just as surely stand for the principle that this connection, minimal though it may be, need be proved in

every Hobbs Act case. After discussing the broad reach of the Hobbs Act, Judge Stevens went on to note,

> This does not mean, however, that we may ignore the constitutional limits on the power of the national government. Nor may we disregard the statutory language which requires the prosecutor to prove some connection with interstate commerce in every case. The language of this statute does not permit us to treat it as a determination that since the class of activities giving rise to federal concern has an adverse effect on commerce, Congress intended any activity within the class to be subject to prosecution without the necessity of any showing of an actual or potential effect on commerce in the particular case. Compare United States v. Hunter, 478 F.2d 1019, 1020-21 (7th Cir.), cert. denied, 414 U.S. 857 (1973).

517 F.2d at 59 & n. 16.

In other words, some interstate nexus must be proved. It may be strong, it may be weak, it may be past, present, or future; but whatever it is, it must be proved. It is not surplusage and cannot be treated as surplusage. Proof of "[t]he charge that interstate commerce is affected is critical since the Federal Government's jurisdiction of this crime rests only on that interference." Stirone v. United States, 361 U.S. 212, 218 (1960).

No interstate nexus was proved in count two of the instant case. The victim of the

extortion charged in count two, (A.17-21) was the olympos Painting Company. The trial court's instruction on count two, insofar as it related to the required element of interstate commerce was as follows:

> 2. That in obtaining and attempting to obtain contracts from the City of Baltimore and others for the chemical cleaning of buildings the Olympos Painting Company intended to move and did cause to be moved certain articles, commodities, men, materials and supplies and machinery in interstate commerce from the State of Maryland to outside the State and vice-versa. (A. 29)

The trial court then charged the jury that, "as a matter of law," any one such transaction, if believed beyond a reasonable doubt by the jury to have occurred, would have affected interstate commerce. (A. 30)

The record is devoid of any evidence of Olympos Painting Company's moving or attempting to move articles, commodities, men, materials and supplies and machinery across state lines. Mr. Nicolaidis, the president of Olympos, testified: his testimony can be found. Neither there nor anywhere else in the record is there such evidence.[1] In short,

[1] There was evidence that Olympos used some Hydron-300 that had been provided by Municipal. There was also evidence that this particular batch of Hydron-300 had been purchased or manufactured out of state. Nonetheless, it is Petitioner's position (developed in depth, infra) that the Government cannot establish the required element of interstate commerce solely through the actions of its own agents. Here, the only arguable link between Olympos and interstate commerce is Olympos's use of a particular batch of chemical provided to it by the Government's own undercover agents. This, Petitioner submits, is insufficient to establish the interstate nexus required by the Hobbs Act.

there is no way a jury could reasonably have concluded, in accordance with the Court's instruction, that the Olympos Painting Company had any interstate connection.

Municipal Chemical Corporation was the "victim" of the extortions charged in counts one, three and four, (A.17-23), but unlike Olympos, Municipal did more "certain . . . materials, supplies and machinery," (A.29) across state lines: some chemical sealer was bought in Pennsylvania, a scaffold was rented from California. Nonetheless, Petitioner submits that if Municipal Chemical Corporation had imported materials from every state in the Union, that fact alone would not have satisfied the jurisdictional element of the Hobbs Act.

Whether a particular set of facts satisfied the jurisdictional requirement of the Hobbs Act--whether it constitutes interstate commerce--is a question of law, to be decided by the court; whether these facts are proved is a question of fact, to be decided by the jury. See, e.g. United States v. Hyde, 448 F.2d 815, 839-41 & n.34. (5th Cir. 1971), cert. denied, 404 U.S. 1058 (1972). Here, the trial court's charge to the jury on counts one, three and four, insofar as it related to the required element of interstate

commerce, differed in no substantial respect from the corresponding charge on count two: Municipal Chemical was treated just like any other company that happened to have been the extorted party in a Hobbs Act case. (A.29-30)

But Municipal Chemical Corporation was not just another company. Municipal was planned, set up, incorporated, staffed, funded, and directed by the Federal Bureau of Investigation. The corporation was not formed to make money or to engage in interstate commerce; it was formed with the express purpose of allowing itself to be "victimized" by some unlucky extortionist. Assuming, but certainly without conceding, that it is legally and logically possible to extort an FBI organization that wants to be extorted, the fact remains that extortion, even if it be proved, does not constitute a violation of the Hobbs Act unless the extorted party's connection with interstate commerce be proved as well. United States v. Staszcuk, 502 F.2d 875, 879 & n.10 (7th Cir. 1974), aff'd in part and reversed in part on other grounds, 517 F.2d 53, cert. denied, 423 U.S. 837 (1975).

We have here, then, a case where the doubly crucial element of interstate commerce-- it comprises both the jurisdictional predicate and a substantive element of the offense-- was provided by the Government.

Appellant is aware of only one other Hobbs Act case in which the Government has resorted to such tactics.[2] A similar situa-

[2] United States v. Gambino, 566 F.2d 414 (2d Cir. 1977). Defendants in Gambino were convicted of, inter alia, violation, or violations, of the Hobbs Act. It appears that the Hobbs Act violation (or some, or all,

tion, however, was involved in United States v. Archer, 486 F.2d 670 (2d Cir. 1973), a prosecution brought under the Travel Act, 18 U.S.C. § 1952 (1970). There, federal agents, apparently in an attempt to transform a local crime into a federal offense, see 486 F.2d at 681, engaged in acts which, had they been engaged in by private parties, would have satisfied the jurisdictional (interstate commerce) requirement of the Travel Act. In

---

of the Hobbs Act violations) stemmed from defendant's extortion, or attempted extortion, of a corporation set up by the FBI. Rejecting defendant's jurisdictional challenges, the court affirmed the Hobbs Act convictions.

The court distinguished United States v. Archer, 486 F.2d 670 (2d Cir. 1973), on the ground that the federal agents in Archer contrived to engage in interstate activity for the sole purpose of creating jurisdiction. In Gambino, however, the court found--based apparently on the trial court record-- that the activities of the undercover corporation "were necessarily wedded to interstate commerce." 566 F.2d at 419. In the case at bar there was no evidence presented which even tends to prove that the activities of the Municipal Chemical Corporation "were necessarily wedded to interstate commerce."

In an attempt to distinguish Archer on another ground, the court indicated that the Hobbs Act's jurisdictional predicate-- interstate commerce-- would have been satisfied even had the FBI corporation not engaged in interstate commerce. See 566 F.2d at 419. The nub of this alternative holding seems to be that the FBI corporation was in the garbage collection business, and that it had been proved--again, based apparently on the record

Archer, the Second Circuit Court of Appeals, speaking through the pen of Judge Henry Friendly, went to some lengths to discuss the fact that the Government's "attempt to set up a federal crime for which these defendants stand convicted went beyond any proper prosecutorial role and needlessly injected the Federal Government into a matter of state concern." Id. at 674-78.

The decision in Archer (reversals of the convictions with instructions to dismiss the indictments) was, however, based "on another, although not unrelated ground," id at 678:

> Our holding is . . . that when Congress responded to the Attorney General's request to lend the aid of federal law enforcement to local officials in the prosecution of

---

below--that the garbage collection industry as a whole "was sufficiently related to interstate commerce." See id.

With all respect, Petitioner submits that this argument simply misses the mark. The Hobbs Act, despite its broad language, clearly requires proof of an interstate nexus of the particular party extorted in each particular case. It is not enough that the victim of the extortion be a member of a class which, as a class, affects or is affected by interstate commerce. See, e.g., United States v. Staszcuk, 517 F.2d 53, 59 & n.16 (7th Cir.) (Stephens, J.), cert. denied, 423 U.S. 837 (1975). And, even if this were enough, which it surely is not, there is no evidence in the case at bar that the Municipal Chemical Corporation was in fact a member of such a class.

> certain crimes, primarily of local concern, where the participants were engaging in interstate activity, [C]ongress did not mean to include cases where the federal officers themselves supplied the interstate element and acted to ensure that an interstate element would be present.

Id. at 682.

In the case at bar, taking the facts in the light most favorable to the government, Glasser v. United States, 315 U.S. 60, 80 (1942), it is clear that "the federal officers themselves supplied the interstate element and acted to ensure that an interstate element would be present." In Hobbs Act prosecutions, if the required interstate nexus cannot be proved directly, it is proved by linking the victim--the extorted party--to interstate commerce. This, indeed, was the Government's strategy in the instant case. See, e.g., the jury instructions on this issue. (A. 29-30)

Petitioner strongly urges this court to examine the following portions of the trial court's instructions to the jury; the trial court's reading of the indictment pertaining to the Hobbs Act counts,(A.17-23), the trial court's paraphrase of these counts,(A23-28) the trial court's instructions on the method whereby the jury was to determine the issue of interstate commerce, (A.29-30) and finally, the trial court's comments upon the evidence,(A.30-31). These few pages contain, to Petitioner's knowledge, the sum total of the trial court's instructions on the subject of interstate commerce, and the trial record itself, viewed through the filter of these instructions, is insufficient, as a

matter of law, to prove any interstate nexus save those slender threads deliberately extablished by the Government's own undercover methods.

Petitioner is well aware of the burdensome task involved in wading through 1500-some pages of transcript in search of the truth; still the sad fact remains that it is impossible to point out a single sentence, or paragraph, or page to support the fact that the record, as a whole, is totally lacking in evidence of any interstate connections other than those few shreds created by the government agents themselves. Nonetheless, the record as a whole is clear; the Government has tried to supply the element of interstate commerce--the jurisdictional predicate and substantive element of the crime--solely through the actions of undercover FBI agents.

Petitioner strenuously urges this court to take heed of Judge Friendly's admonition in Archer that "[m]anufactured federal jurisdiction is even more offensive in criminal than in civil proceedings." Petitioner further asks this court to consider the constructive comparison with 28 U.S.C. § 1359 suggested by Judge Friendly. See, e.g., McSparran v. Weist, 402 F.2d 867, 873 (3rd Cir. 1968) (en banc), cert. denied, 395 U.S. 903 (1969) (manufactured federal jurisdiction "is a reflection on the federal judicial system and brings it into disrepute"). Furthermore, this court has fully and explicitly adopted the reasoning of the third circuit in McSparran. See Lester v. McFaddon, 415 F.2d 1101, 1104 (4th Cir. 1969) (Haynsworth, C.J.).

Petitioner also asks this court to remember that, although some may question the propriety of the Government's role in this

case, the issue here is not one of entrapment: the question whether Petitioner was predisposed to commit a crime is irrelevant. This is not a case like United States v. Russell, 411 U.S. 423 (1973), where Government agents supplied to the defendant a chemical "element" without which he might have been unable to commit the crime; rather, this is a case like Archer: government agents, solely through their own behavior, supplied to the court an element without which there would have been no federal jurisdiction and no federal crime.

Petitioner also asks this court to consider the impact on our federalist system were the practice of federal undercover agents' manufacturing criminal jurisdiction to be given the stamp of judicial approval. "Today there is widespread concern whether the federal criminal law has not outrun reasonable bounds." 486 F.29 at 677; see, e.g., United States v. States, 488 F.2d 761, 767 (8th Cir. 1973) (Ross, J., concurring), cert. denied, 417 U.S. 909 (1974). Professor Norman Abrams, reporting to the National Commission on Reform of Federal Criminal Laws, discussed the "extreme" model whereby "all conduct that is traditionally made criminal under State law would constitute a violation of Federal law." Speaking in his capacity as reporter to the Commission he found such an "extreme" unpalatable: "Plenary Federal criminal jurisdication would carry with it general Federal police power and a truly national police force. The concomitant centralization of law enforcement authority in Washington would be clearly unacceptable." N. Abrams, Consultant's Report on Jurisdiction, 1 Working Papers of the National Commission on Reform of Federal Criminal Laws 33, 35 (1970).

Although it "is clearly . . . unacceptable" that the federal government be given juris-

diction over all violations of state criminal law, already "'[f]ederal auxiliary criminal jurisdiction' has spread to the point where '[t]here is practically no offense within the purview of local law that does not become a Federal crime if some distinctive Federal element happens to be present.'" 486 F.2d at 678 (quoting from N. Abrams, supra at 36) (emphasis added). Petitioner submits that to judicially countenance the federal prosecutor's providing the "distinctive federal element" solely through the actions of the Government's own undercover agents is tantamount to giving the federal prosecutor complete discretion to exercise "clearly . . . unacceptable" extreme of plenary criminal jurisdiction. That such pleanary criminal jurisdiction could be established even by Congress is open to constitutional question, see, e.g., N. Abrams, supra at 35; that it could be established at the whim of a federal prosecutor seems unthinkable.

This final point--the impact of the decision in this case on the allocation of power between the state and federal governments--is not to be lightly dismissed. Petitioner submits that this case should be considered in light of the clear trend towards ensuring the states' continued responsibility for matters traditionally considered of primarily state concern. See, e.g., National League of Cities v. Usery, 423 U.S. 833 (1976); Kilberg & Fort, National League of Cities v. Usery: Its Meaning and Impact, 45 Geo. Wash. L. Rev. 613, 632 (1977) ("National League of Cities holds . . . that federal power derived from the commerce clause is not plenary, as was previously thought.")

Moreover, even when the accepted powers of the federal government under the commerce clause were at their zenith, the Hobbs Act

was never pushed to the hilt. See, e.g., United States v. Enmons, 410 U.S. 396 (1973). The Act, if read literally and applied with an expanded notion of "interstate commerce," see, e.g., Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964), would give the federal courts criminal jurisdiction over virtually every intrastate robbery and extortion, a fact gleefully pointed out by a United States Attorney commenting in the Seton Hall Law Review. See, Stern, Prosecutions of Local Political Corruption Under the Hobbs Act: The Unnecessary Distinction Between Bribery and Extortion, 3 Seton Hall L. Rev. 1, 11-12 (1971). This sort of expansive reading of the Hobbs Act is meeting with more and more judicial skepticism. See, e.g., United States v. Yokley, 542 F.2d 300 (6th Cir. 1976), where Harry Phillips, Chief Judge of the Sixth Circuit Court of Appeals, noted:

> This [broad] interpretation and application of §1951, as urged by the Government, would encompass literally any armed robbery occuring in any state. Accordingly, under the interstate commerce rule, the robbery of a corner grocery store, pharmacy, or gasoline service station, without more, would be a federal offense. The offense of armed robbery, traditionally a matter of concern under state criminal laws, would become a matter within the responsibilities of the United States Attorneys and the federal courts. The legislative history of the Hobbs Act and its predecessor statute demonstrates to our satisfaction that no such sweeping result was intended by Congress.

Id. at 305-05 (Phillips, C.J.).

The sixth circuit's opinion in Yokley was recently followed by United States v. Culbert, 548 F.2d 1355 (9th Cir. 1977) (per curiam). The Ninth Circuit Court of Appeals, in a per curiam opinion, praised the reasoning in Yokley and said:

> [A] contrary interpretation of the [Hobbs] Act would justify federal usurpation of virtually the entire criminal jurisdiction of the states. Considerations of federalism, apart from the legislative history also emphasized in Yokley, cannot permit a conclusion that Congress intended to work such an extraordinary and unprecedented encroachment into the realm of state sovereignty.

548 F.2d at 1357

It is not without significance that the ninth circuit, in Culbert, appears to have overruled, albeit sub silentio, a line of cases in which it had accorded the Hobbs Act a considerably broader reach. See id. at 1358 (Carter, J., concurring and dissenting). Similarly the seventh circuit, which had previously required less in the way of an interstate commerce nexus to support a Hobbs Act conviction then had any other circuit, see, e.g., United States v. Kuta, 518 F.2d 947 (7th Cir.), cert. denied, 423 U.S. 1014 (1975); United States v. Staszcuk, 517 F.2d (7th Cir.), cert. denied, 423 U.S. 837 (1975), has "turned [its] back on the 'expansive interpretation to cover a wide range of extortionate activity' and [has] opted for a narrow alley of jurisdictional footpaths." United States v. Elders No. 77-1191, slip op.

at 12 (7th Cir. Feb. 1, 1978) (Bauer, J., dissenting). Recitation of the pertinent facts in Elders would be lengthy; but it will suffice for present purposes simply to note that the interstate commerce connection in Elders was more substantial than the connection in the instant case even if it be assumed, arguendo, that an undercover FBI Corporation can provide the interstate nexus required by the Hobbs Act. Nonetheless, Elders' Hobbs Act conviction was vacated.

A final example of what appears to be a growing trend towards a more narrow view of the jurisdictional reach of the Hobbs Act is United States v. Merolla, 523 F.2d 51 (2nd. Cir. 1975). In Merolla, the second circuit Court of Appeals, which had previously required quite little in the way of an interstate commerce connection in order to sustain a Hobbs Act conviction, see, e.g. United States v. Augello, 451 F.2d 1167 (2d Cir. 1971), reversed the defendant's section 1951 convictions on the ground that the extorted party's connection with interstate commerce "appeared to be a one-shot deal," 523 F.2d at 55. Here again, recitation of the pertinent facts would be lengthy, but the circuit court opinion contains evidence of several facts the existance of which has, in earlier times, led courts to hold, in Hobbs Act cases, that the interstate commerce requirement had been satisfied.

In conclusion, Petitioner submits that the "interstate commerce connections" proved at trial in this case were, at most, minimal and are, under the more enlightened view of the jurisdictional reach of section 1951 now emerging in the federal judicial circuits of this country, insufficient as a matter of law to establish federal criminal jurisdiction under the Hobbs Act. Moreover, these minimal "interstate commerce connections" were sup-

plied solely through the actions of the Government's own agents. Petitioner respectfully submits that, under these circumstances, his Hobbs Act convictions cannot stand.

CONCLUSION

Petitioner respectfully requests that this Honorable Court grant the requested Writ of Certiorari for the reasons discussed above.

Respectfully submitted,

Harold I. Glaser

Richard M. Karceski

Saul Z. Reese

Attorneys for Petitioner

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 77-2006

UNITED STATES OF AMERICA,

Appellee,

v.

GEORGE JOSEPH SANTONI,

Appellant.

No. 77-2007

UNITED STATES OF AMERICA,

Appellee,

v.

JOHN JAKE KONSTANTINE JAKUBIK,

Appellant.

Appeals from the United States District Court for the District of Maryland, at Baltimore. Edward S. Northrop, District Judge.

Argued July 17, 1978 Decided October 19, 1978

Before BOREMAN and FIELD, Senior Circuit Judges, and HALL, Circuit Judge.

FIELD, Senior Circuit Judge:

George Santoni and John Jakubik appeal from their convictions under 18 U.S.C. § 1951 (Hobbs Act),[1] following a joint jury trial.

---

[1] 18 U.S.C. § 1951 reads in pertinent part as follows:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section -
>
> * * * *
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.
>
> (3) The term "commerce" means commerce within the District of Columbia,

The appellants were jointed under Rule 8(b) of the Federal Rules of Criminal Procedure and charged in a multicount indictment. Santoni was charged with violating 18 U.S.C. § 1951 (extortion) and § 2 (aiding and abetting) in Counts One through Four and with violating 26 U.S.C. § 7206 (1) (tax evasion) in Count Five; he was convicted on Counts One through Four and acquitted on Count Five. Jakubik was charged with violating 18 U.S.C. §§ 1951 and 2 in Counts Two and Three; he was convicted on Count Two and acquitted on Count Three. Both Santoni and Jakubik appeal, contending that there was an insufficient nexus with interstate commerce to support a conviction under the Hobbs Act. In addition, Jakubik argues that (1) "property" was not extorted within the meaning of the Hobbs Act, (2) it was reversible error for the trial court to deny his pre-trial motion for severance based on improper joinder under Rule 8(b), and (3) it was reversible error for the trial court to deny his Rule 14 motion for severance when only one day before the end of their joint trial Santoni stated that he would not take the witness stand.

This case centers around the federal government's attempt to uncover in the city of Baltimore a practice under which contrac-

---

> or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points withing the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

tors were required to kick back a percentage of their contract fees to various officials in exchange for assurances of future contracts and the evasion of inspections during the performance of their contracts. As a part of this investigation, Municipal Chemical Corp. was organized in February, 1975, with the financial support of the FBI, for the specific purpose of obtaining evidence relative to political kickbacks and extortion incident to local government contracts in Baltimore. Although the realization of profit was not a primary goal of Municipal Chemical, the corporation was designed to acquire and perform contracts in the field of chemical cleaning and building demolition while pursuing its undercover activity. Salvatore Spinnato was hired to work in cooperation with the FBI as a paid consultant to Municipal Chemical, and was the only person in the corporation familiar with chemical cleaning. FBI agents Dudley Hodgson and Ronald Miller acted as officers of Municipal Chemical. During the period covered by the indictment, appellant Santoni was a member of the Maryland House of Delegates and had been assisted in his election effort by appellant Jakubik who was a building maintenance foreman for the city of Baltimore.

In May of 1975, Olympos Painting Co. acquired a contract to clean two public schools in the Baltimore area. Later in that spring Spinnato informed Santoni, whom he had known previously, that he was involved with Municipal Chemical and that it had bid unsuccessfully on the cleaning contract awarded to Olympos Painting. Santoni informed Spinnato that he could help Municipal Chemical but that it would cost ten percent of all contract fees plus an initiation fee of $3,000. Spinnato paid Santoni the $3,000, and Santoni advised him that he could obtain a subcontract for Municipal Chemical from Olympos Painting.

Jakubik arranged for a meeting between Santoni and Konstantinos Nicolaidis, president of Olympos Painting, at which meeting Santoni was introduced by Jakubik, according to Nicolaidis' testimony as "a state delegate [who] can help you if you ever have a problem * * *. And it is good to have a friend like this * * * on account of [Santoni's] being a politician and state delegate." At this meeting Santoni requested that Olympos Painting give Municipal Chemical a subcontract to clean one of the two Baltimore schools, but Nicolaidis was reluctant to enter into such an arrangement.

At a subsequent meeting Santoni, Jakubik, Spinnato, Hodgson, Miller and Nicolaidis discussed the possibility of a subcontract for Municipal. After Nicolaidis refused Municipal Chemical's offer to perform the work for $32,000, according to Nicolaidis' testimony, Jakubik reminded Nicolaidis "about he knowing people, that they can help contractors, that it's good to have these people as friends, and sometimes you couldn't affort to have them against you." During this same meeting, Santoni informed Nicolaidis that there would be no trouble with inspectors. Nicolaidis subsequently agreed to award the subcontract to Municipal Chemical at the price of $16,000 because, according to his testimony, " I thought I was getting into or associating with people that would be helping me in future contracts." On July 21, 1975, after signing and delivering the subcontract to Nicolaidis, the principals of Municipal Chemical paid Santoni $1,600 to cover the ten percent kickback fee.

In the performance of its subcontract, Municipal Chemical used Hydron 300, a chemical manufactured in Pennsylvania, as expressly required by the original contract. In

addition Municipal Chemical rented power scaffolding and accessories from Sky-Climber, Inc., of California. After completing its work under the subcontract, Municipal Chemical sold 55 gallons of Hydron 300 to Nicolaidis for use by Olympos Painting in completion of the contract.

About the time the school subcontract was being completed, Santoni informed Spinnato that it would cost Municipal Chemical $10,000 for his assistance in the acquisition of demolition contracts, and agent Hodgson paid Santoni the amount requested by him. In February of 1976, approximately one year after its formation, Municipal Chemical Corp. was forced to terminate its operations because Spinnato's undercover activity had been revealed.

INTERSTATE COMMERCE

Counts One through Three were based upon the chemical cleaning contract and subcontract while Count Four involved the attempt to acquire demolition contracts. With respect to the chemical cleaning contract and subcontracts, appellants argue that (1) the government created the only connection with interstate commerce and thus manufactured the jurisdictional requirement, and (2) Municipal Chemical was only a "one shot deal" and thus there was no real effect on interstate commerce as a result of appellant's activities. We do not agree and conclude that the requisite nexus with interstate commerce under the Hobbs Act was established in Counts One through Three.

Appellants contend that Municipal Chemical, the government created corporation, provided the only connection with interstate commerce

by making purchased of Hydron 300 and renting scaffolding, both of which were manufactured out-of-state. They argue that the logical extention of holding that the interstate commerce jurisdictional element was met in such fashion would permit the government to assume federal jurisdiction over purely state criminal cases by manufacturing a nexus with interstate commerce. In making this argument the appellants rely strongly on United States v. Archer, 486 F.2d 670 (2 Cir. 1973), which involved 18 U.S.C. § 1952 (Travel Act), making it a federal crime to use any facility in interstate commerce to carry on an illegal activity. In Archer the only connection with interstate commerce consisted of interstate phone calls initiated by a government agent for the express purpose of creating jurisdiction, with the exception of one transcontinental call which the court discarded as "'a casual and incidental occurrence.'" Id. at 682. The Second Circuit expressed its disapproval of the government's methods of uncovering the illegal activity and its attempts to create jurisdiction. While the conviction was reversed, upon rehearing the court narrowed its holding to those cases where the interstate commerce element "is furnished solely by undercover agents." Id. at 685-86. The Second Circuit's subsequent decision in United States v. Gambino, 566 F.2d 414 (1977), appears to further restrict Archer. In Gambino the FBI had organized a sanitation collection company in an effort to uncover extortionate pressure being place on similar companies by the defendants. The only connection with interstate commerce was the government's out-of-state purchases of equipment, and dumping of garbage in New Jersey because of cheaper rates. The court distinguished Archer by noting that it involved the contrived use of interstate facilities whereas in Gambino "the activities of [the government corporation] were

necessarily wedded to interstate commerce." 566 F.2d at 419 (emphasis added). In our opinion the present case is distinguishable from Archer and falls within the rationale of Gambino since the contract with the city required the use of Hydron 300. Regardless of who performed the work on the two Baltimore schools, interstate commerce would have been involved in the cleaning process by this required use of Hydron 300. In addition the rented scaffolding, manufactured out-of-state, was a necessary part of the cleaning process. Appellants' reliance on Archer is further undercut by our decision in United States v. LeFaivre, 507 F. 2d 1288 (4 Cir. 1974), cert. denied, 420 U.S. 1004 (1975), where we concluded that the interstate requisite of the Travel Act is satisfied if there is "some utilization of a facility in interstate commerce and it is not requisite that such use be substantial or integral to the operation of the illegal enterprise." Id. at 1299.

Appellants further rely upon United States v. Yokley, 542 F.2d 300 (6 Cir. 1976), where the court place a restrictive construction upon the Hobbs Act, observing that the government's interpretation of the statute "would encompass literally any armed robbery occurring in any state." Id. at 304. The approach of the court in Yokley however, was rejected in United States v. Culbert, _____ U.S._____, 46 U.S.L.W. 4259 (March 28, 1978), where the Supreme Court stated:

> With regard to the concern about disturbing the federal-state balance, moreover, there is no question that Congress intended to define as a federal crime conduct that it knew was punishable under state law. The legislative debates are replete with statements that the Hobbs Act

> was already punishable under state robbery and extortion statutes.* * *
>
> Our examination of the statutory language and the legislative history of the Hobbs Act impels us to the conclusion that Congress intended to make criminal all conduct within the reach of the statutory language.

Id. at 4261. The fact that the present convictions may also constitute state criminal offenses is thus immaterial for our purposes provided that there was a sufficient nexus with interstate commerce to satisfy the Hobbs Act.

The appellants contend that Municipal Chemical was a "one-shot deal" and, accordingly, there was no effect on interstate commerce. In making this argument they rely primarily upon United States v. Merolla, 523 F.2d 51 (2 Cir. 1975), and United States v. Elders, 569 F.2d 1020 (7 Cir. 1978). In our opinion, however, the continuing nature of Municipal Chemical's activity and its use of material which necessarily traveled in interstate commerce is sufficient to distinguish the present case from those cited by appellants. Of further significance on this point is the fact that Municipal Chemical had no intention of ceasing operations following performance of the cleaning contract, and it was only when Spinnato's undercover activity had been revealed that it terminated its operations.

Santoni also challenges Count Four, contending that the government failed to offer any evidence of interstate transactions connected with the proposed demolition contract. In our opinion, however, Santoni's argument

on this point is answered by our decision in United States v. Spagnolo, 546 F.2d 1117 (4 Cir. 1976) (per curiam), cert. denied, 433 U.S. 909 (1977), where we elected to place a broad construction upon the Hobbs Act, stating "all that is required to bring an extortion within the statute is proof of a reasonably probable effect on commerce, however minimal, as a result of the extortion." Id. at 1119. The defendants in Spagnolo had forced the victim, under threat of physical harm, to execute a sale of his interest in a construction firm which received most of its materials through interstate commerce and, additionally, required him to pay to the defendants the sum of $1,500. We noted that the withdrawal of the victim was reasonable calculated to reduce the funds necessary to purchase materials in interstate commerce, and that the defendants' conduct in forcing him to sell his interest in the firm satisfied the interstate commerce requirements.

In our opinion Santoni's conduct in extorting $10,000 from Municipal Chemical with respect to the demolition contracts parallels that of the defendants in Spagnolo. In each instance, interstate commerce was affected by the extortion of funds which otherwise might reasonably have been expected to be channeled into the purchase of material in interstate commerce.

PROPERTY

Jakubik urges upon us that his conviction under Count Two cannot stand because "property" was not extorted within the meaning of the Hobbs Act. He argues that the property alleged to have been extorted was the subcontract, and that in the absence of benefit to the extortionist the Hobbs Act requires some loss to the victim; that since the subcontract was entered into for valuable consideration, there

was no loss to Olympos Painting.

Extortion under the Hobbs Act does not require a direct benefit to the extortionist, United States v. Green, 350 U.S. 415, 420 (1956); "[t]he gravamen of the offense is loss to the victim," United States v. Frazier, 560 F.2d 884, 887 (8 Cir. 1977) and such loss includes intangible as well as tangible property. United States v. Nadaline, 471 F.2d 340, 344 (5 Cir. 1973), cert. denied, 411 U.S. 951 (1973); United States v. Tropiano, 418 F.2d 1069, 1075-76 (2 Cir. 1969), cert. denied, 397 U.S. 1021 (1970). In Tropiano the defendants were partners in a refuse removal company known as C & A. When Caron Refuse Removal, Inc., replaced C & A in servicing some of C & A's customers, the defendants by threats of violence forced Caron Refuse to cease further attempts to acquire C & A's customers and to consent not to solicit any more business in that area. The Second Circuit held that the property extorted was the right of Caron Refuse to solicit business free of territorial restrictions wrongfully imposed by its competitors. 418 F.2d at 1076. We agree with the government that here, as in Tropiano, the property extorted was the right of Olympos to make a business decision free from outside pressure wrongfully imposed, and this is sufficient to sustain the convictions on Count Two.

PRE-TRIAL MOTION FOR SEVERENCE

Jakubik contends that under the standards set forth in Rule 8(b) of the Federal Rules of Criminal Procedure,[2] he and Santoni were

[2] Fed. R. Crim. P. 8(b) provides:

improperly joined in the indictment. If the defendants were improperly joined under Rule 8(b), severance was, of course, mandatory and not a matter of discretion with the trial court. United States v. Marionneaux, 514 F.2d 1244, 1248 (5 Cir. 1975); Ingram v. United States, 272 F.2d 567, 569-70 (4 Cir. 1959); 8 Moore's Federal Practice ¶8.04 [2] (2d ed. 1977). On the other hand, if joinder was proper the trial court was permitted to exercise its discretion in determining whether or not to proceed with a joint trial. Ingram v. United States, supra, at 569-70; see United States v. Whitehead, 539 F.2d 1023 (4 Cir. 1976). The test for joinder under Rule 8(b) is whether the defendants "are alleged to have participated in the same act or transaction or in the same series of acts or transactions." Where the defendants' acts are part of a series of acts or transactions, it is not necessary that each defendant be charged in each count, nor to show that each defendant participated in every act or transaction in the series. United States v. Scott, 413 F.2d 932, 934-35 (7 Cir. 1969), cert. denied, 396 U.S. 1006 (1970); 1 C. Wright, Federal Practice and Procedure § 144, at 324 (1969). Although "series of acts or transactions" is not defined

---

(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

in the Rule, such phrase logically includes those transactions so interconnected in time, place and manner as to constitute a common scheme or plan. United States v. Jackson, 562 F.2d 789, 796 (D.C. Cir. 1977); United States v. Scott, supra. The series of acts engaged in by Santoni and Jakubik constituted a scheme or plan of extortions through the wrongful use of fear of financial injury and under color of official right. Although Jakubik was not charged in Count Four relative to the demolition contract, it is clear that the charge under Count Fourt was part of the series of extortions involving the officers of Municipal Chemical and engaged in by Jakubik and Santoni. Count Five involved a charge against Santoni of tax evasion due to his failure to report the income extorted from Municipal Chemical. Thus it, too, was part of the series of acts engaged in by the defendants since such evasion was necessary to conceal the extortionate activity. Accordingly, joinder was proper, and the trial court did not err in proceeding with the joint trial of Santoni and Jakubik.

RULE 14 MOTION FOR SEVERANCE

Near the end of their joint trial Santoni indicated for the first time that he would exercise his Fifth Amendment privilege not to testify. After being apprised of Santoni's intention, Jakubik moved for a severance pursuant to Rule 14 of the Federal Rules of Criminal Procedure.[3] Jakubik contends that

---

[3] Fed. R. Crim. P. 14 provides:

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an

he expected Santoni to testify in their joint trial because counsel for Santoni so indicated during his opening statement. Incident to his motion, Jakubik proffered that if he was granted a severance, Santoni would testify in Jakubik's separate trial that (1) Jakubik's involvement in the extortion was purely a political favor to Santoni; (2) Jakubik exaggerated his political importance; (3) Jakubik received none of the money which passed from Municipal Chemical to Santoni; (4) Jakubik never threatened anyone nor engaged in any effort to extort anything; and (5) Jakubik had no knowledge of the extortionate activity. Santoni's counsel agreed that Jakubik's proffer accurately reflected what Santoni would testify to in a separate trial.

The grant or denial of a motion for severance under Rule 14 lies within the sound discretion of the trial court and its action on such a motion will be overturned only when there has been a clear abuse of such discretion. United States v. Gay, 567 F.2d 916, 919 (9 Cir. 1978); United States v.

---

indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection in camera any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

Jamar, 561 F.2d 1103, 1106 (4 Cir. 1977). The trial court must weigh the inconvenience and expense to the government and witnesses of separate trials against the prejudice to the defendants inherent in a joint trial, and its determination will not be disturbed unless the denial of a severance deprives the movant a fair trial and results in a miscarriage of justice. United States v. Walsh, 544 F.2d 156, 160 (4 Cir. 1976), cert. denied, 429 U.S. 1093 (1977); United States v. Frazier, 394 F. 2d 258, 260 (4 Cir. 1968), cert. denied, 393 U.S. 984 (1968). The movant must show something more than merely a better chance of acquittal and "must overcome the burden imposed by a stringent standard of review." United States v. Jamar, supra, at 1106.

Jakubik relies principally upon our decision in United States v. Shuford, 454 F.2d 772 (4 Cir. 1971). In that case, however, the testimony of his co-defendant was crucial to Shuford's defense and was unavailable from any other source. In holding that a severance should have been granted, we recognized the unique factual setting of the case, stating:

> We reach this conclusion, aware of the vital importance of Jordan's testimony to Shuford's defense, and in light of the substantial expectation that Jordan, if severance were granted, would indeed testify as indicated. We emphasize that our approach in this case does not mandate a severance in every situation where one defendant desires the testimony of another. We hold only, on the specific facts of this case, that Jordan's testimony took on unusual importance for Shuford's defense; that this testimony could become available

only be severance; and that in these circumstances it was reversible error to deny Shuford's motion. (Footnote omitted).

Id. at 779. The factual setting which supported the motion in Shuford differs significantly from Jakubik's case for Santoni's proffered testimony lacks the degree of exculpation which was present in Shuford. Testimony that Jakubik's involvement was purely political and that he exaggerated his political importance had no bearing upon the Hobbs Act violation, and the other items in the proffer were largely conclusory and had less than a pivotal bearing upon Jakubik's guilt or innocence. Under these circumstances, we cannot say that the trial court abused its discretion or that Jakubik was denied a fair trial by the denial of his motion.

The judgments of conviction are affirmed.

A F F I R M E D

APPENDIX B

APPENDIX TO PETITIONER'S BRIEF
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

electronic recordings introduced in evidence in this trial were obtained legally, and you are not to consider the question of how those recordings were obtained.

Now, a paper containing the formal accusations against the defendants has been drawn up in this case. It is called an indictment. The indictment, while it tells what the defendants are accused of, is not evidence against them. To judge the evidence, however, you need to know what the Government is trying to prove. Therefore, I am going to read the pertinent parts of the indictment and instruct you on the law applicable to the statutory sections set forth in the indictment.

You will note that the indictment charges that the offense was committed on or about a certain date. It is not necessary that the proof establish with certainty the exact date of the alleged offense. It is sufficient that the evidence shows beyond a reasonable doubt that the offense was committed on a date reasonably near to the date alleged.

I'm going to read the indictment, and, as I say, that is what the Government would prove in the case and I am going to let you take the copy of the indictment, of course, to the Jury room with you.

The Grand Jury for the District of Maryland charges:

1. At all times hereinafter mentioned the City of Baltimore, Maryland, has, from time to time, awarded contracts for the construction of public projects including demolition of publicly-owned buildings and maintenance of publicly-owned buildings, which projects were and are dependent for completion upon commerce, as that term is defined in Section 1951 of Title 18, United States Code, for materials, equipment, supplies, labor and professional services.

2. At all times hereinafter mentioned the Municipal Chemical Corporation, 4620 York Road, Baltimore, Maryland 21210, was a corporation formed under the general laws of the State of Maryland.

3. At all times hereinafter mentioned the aforesaid Municipal Chemical Corporation had as its president one Douglas Bennett Hollier, a name adopted for the purpose of concealing that person's true identity as a Special agent of the Federal Bureau of Investigation, Baltimore, Maryland.

4. At all times hereinafter mentioned the aforegoing Municipal Chemical Corporation had as an employee, one Ron Marco, a name adopted for the purpose of concealing that person's true identity as a Special agent of the Federal Bureau of Investigation, Baltimore, Maryland.

5. At all times hereinafter mentioned, George Joseph Santoni was a public official of the State of Maryland; to wit, a member of the House of Delegates of the Maryland General Assembly; and, for part of the time hereinafter mentioned, was a public official of the City of Maryland. Of the what? Of the City of Maryland? City of Baltimore, I guess, isn't it?

MR. FAIRBANKS: Yes, Your Honor.

THE COURT: To wit, -- what it says is City of Maryland; to wit, a Utility Aid in the Department of Public Works, Bureau of Construction Management, Division of Utility Construction, City of Baltimore.

6. At all times hereinafter mentioned in this count the aforesaid Municipal Chemical Corporation was attempting to obtain contracts from the City of Baltimore for the chemical cleaning of brick, stone work and masonry on City owned buildings. For the purpose of preparing to perform and performing the chemical cleaning, the Municipal Chemical Corporation intended to move and did cause to be moved articles, commodities, men, materials, supplies and machinery in interstate commerce between various states of the United States, and the State of Maryland, and more particularly, from the outside the State of Maryland to the City of Baltimore within the State of Maryland.

7. On or about June 26, 1975, in the State and District of Maryland,

GEORGE JOSEPH SANTONI

the defendant herein, knowingly, willfully and feloniously did obstruct, delay and affect commerce, as the term commerce is defined in Section 1951 of Title 18, United States Code, and the movement of persons, articles and commodities in commerce by extortion, as that term is defined in Section 1951 of Title 18, United States Code, in that, on or about the date specified in this count, and this is the first count, the defendant, George Joseph Santoni, did obtain approximately $3,000.00 in United States Currency from the Municipal Chemical Corporation and from its

officers, owners and agents, with the consent of the said Municipal Chemical Corporation and its officers, owner and agents, said consent having been induced by George Joseph Santoni both by the wrongful use of fear of financial, economic and physical injury, and, under color of official right.

COUNT TWO

And the Grand Jury for the District of Maryland further charges:

1. The allegations contained in paragraphs one, two, three, four, five and six of Count One are incorporated by reference herein as though fully set forth in this count, and those I think you will remember as you look at them were the ones describing Baltimore and the Chemical Corporation and so forth which you can see when you look it over.

2. At all times hereinafter mentioned, the defendant, John Jake Konstantine Jakubik was a public official in the City of Baltimore, to wit, building maintenance general foreman, Department of Education, City of Baltimore.

3. At all times hereinafter mentioned, the Olympos Painting Company, 123 South Clinton Street, Baltimore, Maryland, was a corporation organized under the general laws of the State of Maryland, and was the low bidder on Baltimore City Contract number BP32275 to perform certain work on school building 87 in the City of Baltimore.

4. At all times hereinafter mentioned in this count, Konstantinos Nicolaidis was the president of the Olympos Painting Company.

5. On or about July 21, 1975, in the

State and District of Maryland, and elsewhere, George Joseph Santoni and John Jake Konstantine Jakubik did knowingly, willfully and feloniously obstruct, delay and affect commerce as the term commerce is defined in Section 1951 of Title 18, United States Code, and the movement of persons, articles, and commodities in such commerce, by extortion, as that term is defined in Section 1951 of Title 18, United States Code, in that, on or about the date specified in this count, the defendants, George Joseph Santoni and John Jake Konstantine Jakubik did obtain for the aforesaid Municipal Chemical Corporation a subcontract to perform certain work on the project mentioned in paragraph three of this count, from the Olympos Painting Company, and its president, Konstantinos Nicolaidis, with the consent of said company and its president and said consent having been induced by the defendants, George Joseph Santoni and John Jake Konstantine Jakubik, both by the wrongful use of fear of financial, economic and physical injury, and under color of official right.

COUNT THREE

And the Grand Jury for the District of Maryland further charges:

1. The allegations contained in paragraphs one through six of count one, and paragraph two of count two, of this indictment are incorporated by reference herein as though fully set forth in the count.

2. On or about July 21, 1975, in the State and District of Maryland, George Joseph Santoni and John Jake Konstantine Jakubik, the defendants herein, knowingly, willfully and feloniously obstruct, delay and affect commerce, as the term commerce is defined in Section 1951 of Title 18, United

States Code, and the movement of persons, articles and commodities in such commerce, by extortion, as that term is defined in Section 1951, Title 18, United States Code, in that, on that date specified in this count, the defendants George Joseph Santoni and John Jake Konstantine Jakubik did obtain approximately $1,600.00 in United States Currency from the Municipal Chemical Corporation and from its officers, owners and agents, with the consent of the said Municipal Chemical Corporation and its officers, owners and agents, said consent having been induced by George Joseph Santoni and John Jake Konstantine Jakubik both by the wrongful use of fear of financial, economic, and physical injury, and under color of official right.

COUNT FOUR

And the Grand Jury for the District of Maryland further charges:

1. The allegations contained in paragraphs one through six of count one are incorporated by reference herein as though fully set forth in this count.

2. At all times hereinafter mentioned in this count, the aforesaid Municipal Chemical Corporation, in addition to attempting to obtain contracts from the City of Baltimore for the chemical cleaning of brick, stone work and masonry on City-owned buildings, was also attempting to obtain contracts from the City of Baltimore for the demolition of City-owned buildings, which demolition work, if obtained, would have caused Municipal Chemical Corporation to move articles, commodities, men, materials, supplies and machinery in interstate commerce between various States of the United States and the State of Maryland, and more particularly from outside

the State of Maryland to the City of Baltimore, within the State of Maryland.

3. On or about October 31, 1975, in the State and District of Maryland, George Joseph Santoni, the defendant herein, knowingly, willfully and feloniously did obstruct, delay and affect commerce as the term commerce is defined in Section 1951 of Title 18, United States Code, and the movement of persons, articles and commodities in such commerce, by extortion, as that term is defined in Section 1951 of Title 18, United States Code, in that, on or about the date specified in this count, the defendant, George Joseph Santoni did obtain approximately $10,000.00 in United States Currency from the Municipal Chemical Corporation and from its officers, owners and agents, with the consent of the said Municipal Chemical Corporation and its officers, owners and agents, said consent having been induced by George Joseph Santoni both by the wrongful use of financial, economic and physical injury and under color of official right.

Now, count five, I'm going to pass over for a minute, and I'll come back to that when I get through the various elements of the crimes that I have described, namely, what is commonly known as the Hobbs Act, and it refers to extortion in connection with goods moving in interstate commerce, so make sure that I do that, gentlemen.

All right. The defendant Santoni is charged with extortion in Counts one, two, three and four of the indictment.

Defendant Jakubik is charged with extortion in counts two and three of the indictment.

Now, the particular statute which this indictment refers to is known as Title 18, U. S. Code, Annotated, Section 1951(b) and (2), defines extortion as follows:

The term extortion means the obtaining of property of another, with his consent, induced by wrongful use of actual or threatened force, violence or fear, under color of official right.

The term fear does not necessarily refer to physical fear or fear of violence. It includes fear of economic loss.

The term under color of official right means a wrongful taking by a public official of money not due him, or his office.

A violation of the extortion statute may occur either by wrongful use of fear of violence, or fear of economic loss or under color of official right.

Counts one, two, three and four of the indictment charge an offense in violation of the Hobbs Act, as I have mentioned, Title 18, U.S.C., Section 1951. Count one charges that Mr. Santoni, on or about June 26, 1975, while he was then a public official of the State of Maryland, obtained approximately $3,000.00 in United States currency from the Municipal Chemical Corporation and its officers, by the wrongful use of fear of financial and physical harm, and, under color of official right. Count one also charges that the acts of defendant Santoni obstructed, delayed and affected commerce in that the Municipal Chemical Corporation was attempting to obtain contracts from the City of Baltimore for the chemical cleaning of brick, stone work and masonry on City-owned buildings and, for the purpose of preparing to perform and performing said acts, intended to move and did cause to be moved articles, commodities, men, materials, supplies and machinery in interstate commerce.

Count two charges that Mr. Santoni and Mr. Jakubik on or about July 21, 1975, while they were both public officials, extorted a subcontract to perform certain work on a City job from Konstantinos Nicolaidis and the Olympos Painting Company by the wrongful use of fear of financial and physical injury and under color of official right.

Count two also charges that the acts of the defendants delayed, obstructed and affected interstate commerce in that the contract involved maintenance of publicly-owned buildings which were dependent for completion upon commerce and that the subcontract was to be given to the Municipal Chemical Corporation which intended to move and did cause to be moved articles, commodities, men, materials, supplies and machinery in interstate commerce.

Count three of the indictment is similar to count one, except that Mr. Jakubik is charged along with Mr. Santoni with obtaining approximately $1,600.00 from the Municipal Chemical Corporation and its officers, owners, and agents by the wrongful use of fear of financial, economic and physical injury and under color of official right.

Count four involves the same charges, but against Mr. Santoni alone. He is charged with obtaining approximately $10,000.00 from the Municipal Chemical Corporation and its officers, owner and agents by the wrongful use of fear of financial, economic and physical injury, and under color of official right. It also makes the same allegations concerning interstate commerce as counts one

through three.

Section 1951 says too, again, interference with commerce by threats or violence, and I am reading and quoting from the Statute, (a) whoever in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce, by extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violence of this section shall by guilty of an offense against the United States.

Now, in addition, the term extortion, I think I read it to you, but I will read it to you again. It's known as Title 18, U.S.C., Section 1951 (b)(2). (b) as used in this section, and then it says, the term extortion means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or, under color of official right.

In order to establish the offense of extortion charged in the indictment, the Government must prove three essential elements.

First, that the defendant induced his victims to part with property;

Two, he did so by extortion as defined in these instructions;

Three, that in doing so, interstate commerce was delayed, interrupted or adversely affected.

The Government is required to extablish each of these elements beyond a reasonable doubt. The law never imposes on the defend-

ant in a criminal case the burden of introducing any evidence or of calling any witnesses.

A separate crime or offense is charged in each count of the indictment. I think you all sat on a case before and you know that, but in any event, counts two and three charge both defendant Santoni and Jakubik with extortion, while counts one and four charge Mr. Santoni alone with the extortion and count five charges a tax violation against Mr. Santoni alone.

Each offense, and the evidence pertaining to it, should be considered separately. The fact that you may find one or both of the accused guilty or not guilty of one of the offenses charged should not control your verdict as to any other offense charged against either of the defendants.

Count two of the indictment charges that the defendants Santoni and Jakubik extorted a subcontract from Olympos Painting Company for the benefit of Municipal Chemical Corporation. This count does not allege that either Mr. Santoni or Mr. Jakubik derived any direct personal benefit therefrom; further, even though you may find from the evidence in the case that Mr. Jakubik received none of the $1,600.00 paid on July 21, 1975 at Smitty's Restaurant, you are instructed that the fact that a defendant received no personal benefit from extortionate acts is not determinative of his guilt or innocence with regard to those acts.

One need receive no personal benefit to be guilty of extortion; the gravamen of the offense is loss to the victim.

Interstate commerce may be adversely affected, within the meaning of these instruc-

tions, by an increase in the cost of doing business in interstate commerce, or by the reduction of the profits from interstate business. It is not necessary to show an actual interruption or delay.

The victim's state of mind is an essential element of defense. Therefore, agent Hodgson's and agent Miller's state of mind must be considered by you, the Jury, in respect to economic fear, mental fear, or physical.

The term fear as used in the statute has the commonly accepted meaning. It is a state of anxious concern, alarm, apprehension or anticipated harm to a business or of a threatened loss, or apprehension of anticipated harm to one's person. The term thus includes both physical fear or fear of economic harm.

Extortion under color of official right is the wrongful taking by a public officer of money not due him or his office, whether or not the taking was accomplished by force, threats, or use of fear. You will note that extortion as defined by Federal law is committed when property is obtained by consent of the victim by wrongful use of fear, or when it is obtained under color of official right, and in either instance, the offense of extortion is committed.

It is not necessary that a public official who exacts a payment for an apparent consideration of securing favorable official action have the power to effect such action. It is only necessary that the victim reasonably believes that the official has that power.

Unless the payments here alleged were made under some form of compulsion, or

because of defendants', or one of their public offices, there is no violation of the extortion statute within the charges set out in the indictment.

As stated before, the Government must show beyond a reasonable doubt that interstate commerce was delayed, interrupted, or adversely affected by the acts charged in the indictment. I am not going to give you an abstract definition of interstate commerce. I instruct you, instead, that you may find interstate commerce within the meaning of these instructions, if you find beyond a reasonable doubt either:

1. That in obtaining and attempting to obtain contracts from the City of Baltimore and others for the chemical cleaning of buildings, the Municipal Chemical Corporation intended to move and did cause to be moved certain articles, commodities, men, materials, supplies and machinery in interstate commerce from the State of Maryland to outside the state and vice-versa.

2. That in obtaining and attempting to obtain contracts from the City of Baltimore and others for the chemical cleaning of buildings and the Olympos Painting Company intended to move and did cause to be moved certain articles, commodities, men, materials and supplies and machinery in interstate commerce from the State of Maryland to outside the State and vice-versa.

3. That in attempting to obtain demolition contracts from the City of Baltimore, the Municipal Chemical Corporation contemplated the movement of articles, commodities, men, supplies, and machinery and materials in interstate commerce from outside the State of Maryland to within the State and

vice-versa.

I charge you, as a matter of law, that as a matter of each company alleged to have been extorted, that is in counts one, three and four, the Municipal Chemical Corporation and, count two, the Olympos Painting Contracting Company, if you find credible, beyond a reasonable doubt, any of the testimony and documents which the Government has introduced into evidence with respect to any one transaction relating to the jurisdictional element of interstate commerce involved in this case, that is to say, as to each such company, if you find that any one transaction has been proven beyond a reasonable doubt with respect to that company's involvement with interstate commerce, then you are instructed that, as to those counts of the indictment which relate to that company, the activity involved in this case did delay, obstruct and affect commerce, as that language is used in the statute under which those counts have been brought.

In other words, your responsibility as to the interstate elements is only to determine, as to each company, whether or not any such transaction has been proven beyond a reasonable doubt. This Court has determined, as a matter of law, that any one such transaction, if proven, as to each company, constitutes a sufficient effect on interstate commerce within the meaning of the law; that question is not for your determination. Now, I'm going to comment on the evidence. The evidence, there was evidence and there were some invoices which indicated the Hydron-300 came from Pennsylvania. I thin there were three, were three, were there not, three invoices.

MR. MARTIN: Yes, sir.

MR. FAIRBANKS: Yes, Your Honor.

THE COURT: Of course, before you can find the defendants guilty on any count of the indictment charging them with violating the Hobbs Act, which is section 1951, that we've been talking about, you must find that all other elements of the crime, as to each count, as I will explain to you, have also been proven beyond a reasonable doubt.

It is not necessary for the Government to show that the defendant intended to specifically obstruct, delay or affect interstate commerce. All that is necessary as to this issue is that the Government's evidence prove that the defendant intended to commit an act prescribed by the statute, the natural consequences of which would be to obstruct, delay or affect commerce.

Intent and motive should never be confused. Motive is what prompts a person to act, and intent refers only to the state of mind with which the act is done. Good motive alone is never a defense where the act done is a crime, for the motive of the accused is immaterial except insofar as evidence of motives may aid determination of state of mind or intent.

Supreme Court, U. S.
FILED
FEB 8 1979
MICHAEL RODAK, JR., CLERK

Nos. 78-843 and 78-944

In the Supreme Court of the United States

OCTOBER TERM, 1978

GEORGE JOSEPH SANTONI, PETITIONER

v.

UNITED STATES OF AMERICA

JOHN JAKE KONSTANTINE JAKUBIK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JOSEPH S. DAVIES, JR.
JODY M. LITCHFORD
Attorneys
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-843

GEORGE JOSEPH SANTONI, PETITIONER

v.

UNITED STATES OF AMERICA

No. 78-944

JOHN JAKE KONSTANTINE JAKUBIK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A16)[1] is reported at 585 F.2d 667.

---

[1] "Pet. App." refers to the appendix to the petition in No. 78-843.

JURISDICTION

The judgment of the court of appeals was entered on October 19, 1978. A petition for rehearing filed by petitioner Jakubik was denied on November 15, 1978. The petition for a writ of certiorari in No. 78-843 was filed on November 20, 1978, and is therefore out of time under Rule 22(2) of the Rules of this Court. The petition for a writ of certiorari in No. 78-944 was filed on December 12, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, there was a sufficient nexus with interstate commerce to support a conviction under the Hobbs Act, 18 U.S.C. 1951 (petitioner Santoni).

2. Whether "property" was extorted within the meaning of the Hobbs Act, 18 U.S.C. 1951 (petitioner Jakubik).

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, petitioner Santoni was convicted on four counts (counts 1-4) and petitioner Jakubik on one count (count 2) of obstruction of interstate commerce by means of extortion, in violation of 18 U.S.C. 1951 (the Hobbs Act) and 2.[2] Petitioner Santoni was sentenced to

[2] Petitioner Santoni was acquitted by the jury of income tax evasion (count 5); petitioner Jakubik was acquitted by the jury on one count of extortion (count 3).

concurrent terms of five years' imprisonment on each count; petitioner Jakubik was sentenced to 18 months' imprisonment. The court of appeals affirmed (Pet. App. A1-A16).

The evidence at trial is set forth in the opinion of the court of appeals (Pet. App. A2-A6). It showed that in order to obtain proof of political kickbacks and extortion in local government contracts in Baltimore, Maryland, the FBI organized the Municipal Chemical Corporation in February 1975, ostensibly to perform contracts for chemical cleaning and building demolition. Two FBI agents acted as officers of the corporation and Salvatore Spinnato, a chemical cleaning specialist, was hired as a consultant. In May 1975, Olympos Painting Company entered into a contract with the City of Baltimore to clean two public schools. Spinnato approached petitioner Santoni, who was a member of the Maryland House of Delegates, and explained that Municipal Chemical had bid unsuccessfully for that contract. Petitioner Santoni advised Spinnatto that for $3,000 plus 10% of all contract fees, he could obtain a subcontract for Municipal Chemical from Olympos.

Petitioner Jakubik, a building maintenance foreman for the City of Baltimore, arranged meetings between petitioner Santoni and Konstantinos Nicolaidis, president of Olympos. At two meetings petitioner Santoni asked Nicolaidis to give a subcontract to Municipal Chemical and suggested that if he complied he would have no trouble with inspectors. Petitioner Jakubik also told Nicolaidis that petitioner

Santoni knew people who could "help contractors, that it's good to have these people as friends, and sometimes you couldn't afford to have them against you" (Pet. App. A5). Nicolaidis then agreed to award the subcontract to Municipal Chemical for $16,000, and Municipal Chemical in turn gave petitioner Santoni a 10% kickback of $1,600. Municipal Chemical also paid petitioner Santoni $10,000 to secure his aid in requiring demolition contracts.

In performing the cleaning operation, Municipal Chemical used Hydron 300, a chemical manufactured in Pennsylvania that was expressly required by the original contract. Municipal Chemical purchased part of the Hydron 300 in Pennsylvania, and also rented scaffolding from a California company to perform the contract.

ARGUMENT

1. Petitioner Santoni contends (Pet. 9-24) that the connection with interstate commerce in this case was provided solely by the activities of the FBI and is hence insufficient to establish jurisdiction under the Hobbs Act. This claim is incorrect.

As petitioner acknowledges (Pet. 9-11), Section 1951 requires only a minimal connection with interstate commerce. "[A]ll that is required to bring an extortion within the statute is proof of a reasonably probable effect on commerce, however minimal, as a result of the extortion." *United States* v. *Spagnolo*, 546 F.2d 1117, 1119 (4th Cir. 1976), cert. denied, 433 U.S. 909 (1977). Here the proof showed that

the extortion was directed at and affected a company that used a chemical that was purchased in Pennsylvania and scaffolding that was rented from a firm in California.

Although petitioner does not dispute that the proof of a nexus with interstate commerce that was offered at trial ordinarily would satisfy the requirements of Section 1951, he argues (Pet. 14-24), relying primarily on *United States* v. *Archer*, 486 F.2d 670 (2d Cir. 1973), that the requirements of the statute are not satisfied when the interstate nexus is "provided by the Government" (Pet. 14). The court of appeals correctly held (Pet. App. A7-A8), however, that *Archer* is inapposite to the circumstances of this case. In that case, the court of appeals reversed a conviction under the Travel Act, 18 U.S.C. 1952 (use of interstate facilities in the commission of certain unlawful acts) because the only proven connection with interstate commerce consisted of interstate telephone calls initiated by government agents solely for the purpose of obtaining federal jurisdiction. Here, in contrast, the chemical used by Municipal Chemical was manufactured and purchased in Pennsylvania and was expressly required by the original city contract. The FBI had no role in establishing that requirement. As the court of appeals stated (Pet. App. A8), "[r]egardless of who performed the work on the two Baltimore schools, interstate commerce would have been involved in the cleaning process by this required use of Hydron 300."

The decision below is further supported by the fact that after *Archer* the Second Circuit upheld a conviction under Section 1951 on facts quite similar to this case. *United States* v. *Gambino*, 566 F.2d 414 (2d. Cir. 1977), cert. denied, 435 U.S. 952 (1978). As the court below explained (Pet. App. A7-A8):

> In *Gambino* the FBI had organized a sanitation collection company in an effort to uncover extortionate pressure being placed on similar companies by the defendants. The only connection with interstate commerce was the government's out-of-state purchases of equipment, and dumping of garbage in New Jersey because of cheaper rates. The court distinguished *Archer* by noting that it involved the contrived use of interstate facilities whereas in *Gambino* "the activities of [the government corporation] were *necessarily* wedded to interstate commerce." 566 F.2d at 419 (emphasis added). In our opinion the present case is distinguishable from *Archer* and falls within the rationale of *Gambino* since the contract with the city *required* the use of Hydron 300.[3]

2. Petitioner Jakubik contends (Pet. 6-10) that no "property" was extorted within the meaning of

[3] Petitioner's further reliance (Pet. 21-22) on *United States* v. *Yokley*, 542 F.2d 300 (6th Cir. 1976), and *United States* v. *Culbert*, 548 F.2d 1355 (9th Cir. 1977), overlooks the fact—noted by the court below (Pet. App. A8-A9)—that this Court reversed the decision in *Culbert*, 435 U.S. 371 (1978), and expressly rejected the reasoning of *Yokley* (*id.* at 372 & n.2).

18 U.S.C. 1951 because Municipal Chemical rendered valuable services to Olympos and, accordingly, Olympos suffered no loss.

Petitioner's claim is based on a misinterpretation of the Hobbs Act. Section 1951(b)(2) defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." It is well established that "property" under this Section includes intangible as well as tangible property (*United States* v. *Nadaline*, 471 F.2d 340, 344 (5th Cir.), cert. denied, 411 U.S. 951 (1973)), and the court of appeals correctly held (Pet. App. A11) that the "right * * * to make a business decision free from outside pressure wrongfully imposed" is a property right within meaning of Section 1951. See also *United States* v. *Tropiano*, 418 F.2d 1069, 1075-1076 (2d Cir. 1969), cert. denied, 397 U.S. 1021 (1970)). In this case petitioners, by wrongful threats and promises, forced Olympos to award a subcontract to Municipal Chemical and thereby to surrender its right to select its own subcontractor and make its own business decisions. Whether petitioners could prove that Olympos was financially better off for having yielded to their extortionate demands is immaterial.[4]

[4] *United States* v. *Enmons*, 410 U.S. 396 (1973), relied on by petitioner Jakubik (Pet. 9), merely holds that there is no "wrongful" taking under the Hobbs Act when a union acts to secure wages *legitimately* due to workers. In this case, the contract did not legitimately belong to Municipal Chemical and petitioners' taking it from Olympos was clearly wrongful.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JOSEPH S. DAVIES, JR.
JODY M. LITCHFORD
Attorneys

FEBRUARY 1979

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 286255 306

see
78
944